

ORIGINAL

FILED

DEC 6 1992

ORIGINAL

UNITED STATES

THE STATE OF NEVADA

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF NEVADA

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR CERTIORARI

MICHAEL PESSETTA*

Executive Director
Nevada Appellate and
Postconviction Project
330 South Third Street, Suite 701
Las Vegas, Nevada 89101
(702) 384-6010

Attorneys for Petitioner
Counsel of Record*

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

CONCLUSION 4

TABLE OF AUTHORITIES

<u>Cases Cited:</u>	<u>Page No.</u>
County of Riverside v. McLaughlin, ___ U.S. ___, 111 S.Ct. 1661 (1991)	1
Griffith v. Kentucky, 478 U.S. 314 (1987)	1
McNeil v. Wisconsin, ___ U.S. ___, 111 S.Ct. 2204, (1991)	2
Pettyjohn v. United States, 419 F.2d 651 (D.C. Cir. 1969) cert. denied 397 U.S. 1058 (1970)	2

<u>Rules:</u>	<u>Page No.</u>
Nev. Sup. Ct. Rule 250(IV)(I)	1

<u>Statutes:</u>	<u>Page No.</u>
Nev. Rev. Stats. § 47.040(2)	1

ARGUMENT

The arguments raised in Respondent's Brief in Opposition to the Petition for Certiorari are essentially misdirected, and they do nothing to refute Petitioner's claim that this Court's intervention is necessary to require the Nevada courts to follow binding constitutional precedent.

1. Respondent argues that Petitioner's claim in the Nevada Supreme Court related only to the delay in his arraignment and that County of Riverside v. McLaughlin, ___ U.S. ___, 111 S.Ct. 1661 (1991) is therefore irrelevant. Respondent does not dispute the fact that the Nevada Supreme Court has, and exercises, the power to review plain errors and to review issues on appeal sua sponte. E.g., Nev. Sup. Ct. Rule 250(IV)(I); Nev. Rev. Stats. § 47.040(2). The Nevada Supreme Court in fact reviewed the issue of the delay in Petitioner's probable cause determination, to which McLaughlin is clearly relevant, and its disposition of that issue must be controlled by the standards imposed by this Court in McLaughlin and Griffith v. Kentucky, 479 U.S. 314 (1987), regardless of how the issue came before it. In short, having chosen to review the issue, the Nevada Supreme Court was bound to decide it in conformity with the Constitution.

Respondent does not dispute the fact that Petitioner was arrested without a warrant and did not receive a probable cause determination within the time mandated by McLaughlin. Since Petitioner's case was pending on direct appeal when McLaughlin was decided, the standard it imposed must be applied here.

2. Respondent makes the peculiar argument that McLaughlin did not impose a new constitutional rule and therefore Griffith v. Kentucky does not require that it be applied to cases pending on direct appeal. Griffith, of course, requires what a new constitutional rule which is a "clear break" from precedent be applied in all cases pending on direct appeal; but it was already the law, before Griffith, that cases which merely imposed a rule following from existing precedent had to be so applied. *Id.* at 324-325. Respondent's argument on this point amounts to a confession of error.

3. Respondent's argument based on the Nevada Supreme Court's discussion of waiver of prompt arraignment under the Nevada statute is entirely beside the point. Whether or not the Nevada Supreme Court found that Petitioner's statutory right to a timely arraignment was waived does not affect the issue presented here, which is based upon the constitutional right to a prompt probable cause determination.¹ Here,

¹Respondent may be attempting to imply that Petitioner should be deemed to have waived his federal constitutional right to a prompt probable cause determination, as a result of an implied waiver of his state statutory right to a prompt arraignment. This position is untenable. The rights protected by the giving of Miranda warnings are Fifth and Sixth Amendment interests, while the right to a prompt probable cause determination is a Fourth Amendment right. This Court recently held that invocation of constitutional rights proceeds on an amendment-by-amendment basis. McNeil v. Wisconsin, ___ U.S. ___, 111 S.Ct. 2204, 2208-2210 (1991). The same rule must be true for purported waivers of constitutional rights, and there is nothing in the record remotely suggesting that Petitioner ever knowingly and intelligently waived his right to a constitutionally-prompt probable cause determination. Further, the constitutional violation was complete before Petitioner received Miranda warnings and made a statement. Whatever the effect of the Miranda waiver may be, it certainly cannot constitute an ex post facto, uncounselled waiver of a claim based upon a constitutional violation which has already occurred.

Respondent's waiver theory is also unsound on the merits. It is based upon Pettijohn v. United States, 419 F.2d 651 (D.C. Cir. 1969), *cert denied* 397 U.S. 1058 (1970), in which the court rejected a defendant's claim that his arraignment was unreasonably delayed during the time he was actually giving a statement to the police. At

as in McLaughlin, the arraignment and probable cause determination were apparently combined, but this does not affect the fact that each determination involves distinct issues.

4. Nothing in Respondent's opposition contests the basic facts relied upon by Petitioner. Petitioner was arrested without a warrant and was not given a probable cause determination within the time prescribed by McLaughlin. The constitutional violation was addressed and acknowledged on the merits by the Nevada Supreme Court's decision; but the relief to which Petitioner was entitled was denied to him because the court failed to apply McLaughlin to his case. The Nevada Supreme Court's failure to apply McLaughlin to Petitioner's case, which was pending on direct appeal at the time McLaughlin was decided, violated Petitioner's right to equal protection of the laws under Griffith v. Kentucky.

The Nevada Supreme Court's decision here presents a clear and present danger of denying the benefit of McLaughlin to all state defendants whose cases are pending on appeal and of substantially confusing the federal law of retroactivity in this jurisdiction, in addition to denying Petitioner his constitutional rights in this case. This Court's continual restriction of the availability of federal collateral review has been based upon the assumption that state courts not act in this fashion, because they will in fact follow this Court's binding precedents. When, as here, that assumption

most, Pettyjohn legitimately stands only for the proposition that a waiver of Miranda rights waives a claim of unreasonable delay in arraignment for the time it takes to obtain the Mirandized statement. Its extension in other cases, to allow postponing an arraignment indefinitely once a suspect has waived Miranda rights and made a statement, is completely unjustifiable.


has proven incorrect, this Court cannot shirk its duty to provide a remedy itself. In this case, the burden to this Court of providing that remedy is de minimis, while the necessity of providing it is great.

CONCLUSION

For the reasons stated above and in the petition, we submit that this Court— should grant a writ of certiorari, vacate the judgment and remand the case to the Nevada Supreme Court for reconsideration in light of Griffith v. Kentucky.

Dated this 6th day of August, 1993.

Respectfully submitted,



Michael Pescetta
Nevada Appellate and Postconviction Project
330 South Third Street, Suite 701
Las Vegas, Nevada 89101
(702) 384-6010

Attorneys for Petitioner
Counsel of Record*